91-238

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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40

APPENDIX TABLE OF CONTENTS

Appendix A
Filed 5/13/91

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ERNEST E. RIGGS,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Nos. 89-6297
	)	&
SCRIVNER, INC., an	)	89-6350
Oklahoma corporation,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-2301-W)

Submitted on the briefs:

Michael T. Braswell, Oklahoma City, Oklahoma
for Plaintiff/Appellant.

David M. Curtis of Lytle Soule & Curlee, Oklahoma City, Oklahoma, for Defendant/Appellee.

Before ANDERSON, TACHA, and BRORBY, Circuit Judge

ANDERSON, Circuit Judge.

Plaintiff appeals from several adverse district court rulings made in this civil action, commenced pursuant to 42 U.S.C. Section 1981 and Title VII, 42 U.S.C. Section 2000e, alleging Defendant wrongfully terminated Plaintiff's employment on the basis of his race, white. In appeal No. 89-6297, Plaintiff asserts ten grounds of error in the trial court proceedings, which ultimately resulted in verdicts in favor of Defendant on both claims. In appeal No. 89-6350, Plaintiff challenges the trial

court's award of costs to Defendant[1].

Plaintiff commenced this action in November 1987, seeking reinstatement, back pay, and actual and punitive damages. Following a trial on the merits, the jury, on June 2, 1988, returned a verdict in favor of Plaintiff on the Section 1981 claim. Also on June 2, the trial court, addressing the Title VII claim, made an initial determination in favor of Defendant.

On June 10, Defendant filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial, challenging the jury's verdict on the

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[1] After examining the briefs and appellate record, this panel has determined unanmiously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34 1.9. The cases are therefore ordered submitted without oral argument.

Section 1981 claim. The district court denied that Motion on September 1. Also on September 1, the district court, ruling it was bound by the jury's determination on the issue of discrimination, reversed its initial determination on the Title VII claim, held in favor of Plaintiff and set a hearing on the issue of Title VII relief. The district court held that hearing on September 9, but did not rule on the issue of Title VII relief.

Defendant filed a notice of appeal on September 27, 1988, challenging the district court's September 1 determinations. On December 7, Defendant filed a Motion for Reconsideration of the denial of its Motion for New Trial, asserting for the first time that the jury's verdict on the Section 1981 claim was the result of a jury compromise. The

district court denied the Motion to Reconsider, but sua sponte ordered a new trial, determining the jury verdict was the result of a compromise.

The district court conducted a second jury trial, which resulted in a verdict in favor of Defendant on the Section 1981 claim. The trial court then held in Defendant's favor on the Title VII claim and awarded Defendant costs.

The issue presented by Plaintiff's first ground for error in appeal No. 89-6297 is whether the district court's referral of this action to mandatory, nonbinding arbitration, pursuant to Western District of Oklahoma Local Rule 43, violated Plaintiff's constitutional right to a jury trial on his Section 1981 claim. See generally Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988) (where Title VII and

Section 1981 claims combined in one action, seventh amendment entitles Plaintiff to jury trial on Section 1981 but not on Title VII claim).

Local Rule 43(P)(1) provides, at the request of a party, for a trial de novo before the district court following arbitration. Further, Rule 43(P)(2) provides, that "unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence" during the trial de novo.

The record indicates that, following the arbitration proceedings, the district court conducted a de novo jury trial on Plaintiff's Section 1981 claim. Referral of this action to arbitration, therefore, did not deny Plaintiff his right to a jury trial. See New England Merchant's Nat'l Bank v. Hughes, 556 F. Supp. 712,

714 (E.D. Pa. 1983) (local compulsory arbitration rule, similar to Local Rule 43, "does not in any way abridge the constitutional right of a litigant to trial by jury since the litigant is entitled to demand a trial de novo provided he has complied with the procedures set forth" in the local rule).

In his second ground for error, Plaintiff asserts the district court erred in considering Defendant's Motion for Reconsideration of the denial of its Motion for a New Trial because Defendant filed the Motion to Reconsider beyond the ten-day period provided by Fed. R. Civ. P. 59(b).[2] Similarly, in his third ground for reversal, Plaintiff asserts

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[2] In his appellate brief, Plaintiff also asserts defendant's Motion for Reconsideration was frivolous and requests an award of sanctions against Defendant. Appellant's Brief (No. 89-6297), 7. This request is denied.

that the district court erred in sua sponte granting a new trial beyond the ten-day time frame provided by Rule 59(d).

The ten-day period provided by Rule 59 begins to run only from the entry of a final judgment. Anderson v. Deere & Co., 852 F.2d 1244, 1246 (10th Cir. 1988); see generally Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (final order ends litigation on merits and leaves nothing for court to do but execute judgment). At the time Defendant filed the Motion for Reconsideration and at the time the district court sua sponte ordered a New Trial, there had been no final judgment entered in this action because the issue of Title VII relief had not yet been determined. See Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976) (where issue of liability has

been determined, but assessment of damages or award of other relief remains to be resolved, order determining liability is not final order.

Because a final judgment had not yet been entered in this action to commence Rule 59's ten-day limitations period, the district court's consideration of the Motion for Reconsideration and the district court's order sua sponte granting a New Trial did not violate Rule 59. Further, because a court possesses the discretion to revise its interlocutory orders prior to the entry of a final judgment, Anderson, 852 F.2d at 1246 (citing Fed. R. Civ. P. 54(b), the district court was not procedurally precluded from ordering a New Trial.

The issue presented by Plaintiff's sixth argument on appeal is whether, because Defendant had filed a notice of

appeal prior to its Motion for Reconsideration, the district court lacked jurisdiction to grant a New Trial. While the filing of a timely notice of appeal divests the district court of jurisdiction, e.g, Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987), a premature notice of appeal is ineffective to transfer jurisdiction from the district court to the Court of Appeals. Art Janpol Volkswagen, Inc. v. Fiat Motors of N. Am., Inc. 767 F.2d 690, 697 (10th Cir. 1985). Because Defendant's notice of appeal was premature, in light of the fact that the issue of Title VII relief has yet to be determined, Defendant's notice of appeal was insufficient to deprive the district court of jurisdiction to grant a New Trial. Id. For these same reasons, Plaintiff's ninth

argument on appeal, that Defendant by filing a notice of appeal but never filing an Appellate Brief, waived any challenge to the jury's verdict in the first trial, also lacks merit.

Plaintiff's fifth argument on appeal challenges the district court's imposition of sanctions against Plaintiff's attorney. Plaintiff's attorney, rather than Plaintiff, was the party aggrieved by the district court's imposition of sanctions and, therefore, was the proper party to appeal from this decision. Federal Trade Comm'n v. Amy Travel Serv., Inc. 875 F.2d 564, 577 (7th Cir.), cert. denied., 110 S. Ct. 366 (1989) (citing Rogers v. National Union Fire Ins. Co. 864 F.2d 557, 559-60 (7th Cir. 1988)). The rules of federal appellate procedure require that the notice of appeal "shall specify the party

or parties taking the appeal." Fed. R. App. P. 3(c); see also Concorde Resources, Inc. v. Woosley (In re Woosley), 855 F.2d 687, 687 (10th Cir. 1988). Failure to name the proper party taking the appeal will result in the dismissal of an appeal for lack of appellate jurisdiction. Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 317 (1988); see also Woosley, 855 F.2d at 688. Because the notice of appeal filed in appeal No. 89-6297 failed to name Plaintiff's attorney as a party to the appeal, this court lacks jurisdiction to review the merits of this argument. See Woosley, 855 F.2d at 687-88; see also Amy Travel Serv. 875 F.2d at 577.

Plaintiff asserts four arguments on appeal challenging the second jury trial. Plaintiff first asserts that, because the issue of Defendant's liability on the

Section 1981 claim had been conclusively resolved by the first jury trial, the only appropriate issue to be addressed during the second trial was the issue of damages. The district court granted a new trial after determining that the verdict in the first trial was the result of a jury compromise.[3] "A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages." National R.R. Passenger Corp. v. Koch Indus. Inc., 701 F.2d 108, 110 (10th Cir. 1983) (emphasis added). The district court's order granting a new trial on both the issue of liability and the issue of damages was not erroneous in

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[3] Plaintiff does not challenge, on appeal, the merits of the district court's decision to vacate the verdict reached in the first jury trial because the verdict represented a jury compromise.

light of the district court's determination that the jury verdict was the result of a compromise. See id.

Plaintiff next asserts both that the district court erred in denying Plaintiff's Motion for a Directed Verdict and that the jury's verdict in favor of Defendant was not supported by sufficient evidence. This court reviews the denial of a Motion for a Directed Verdict de novo. Guilfoyle ex rel. Wild v. Missouri, Kan. & Tex. R.R. Co., 812 F.2d 1290, 1292 (10th Cir. 1987). A directed verdict is appropriate only if the evidence, viewed in the light most favorable to the nonmoving party, "points but one way and is susceptible to no reasonable inferences supporting" the nonmoving party. Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988). Further, this

court's review of the evidence underlying a jury verdict in a civil case is limited to determining "whether the record contains substantial evidence to support the jury's . . . conclusion, viewing the evidence in the light most favorable to the prevailing party." Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248, 251 (10th Cir. 1987). After careful review of the evidence presented during the second jury trial, we determined that Plaintiff was not entitled to a directed verdict and that substantial evidence supported the jury's verdict in favor of Defendant.

Lastly, Plaintiff asserts the trial judge erred in making statements prejudicial to Plaintiff in the presence of the jury. Review of the record fails to indicate any remark made by the trial court which might have prejudiced

plaintiff's case before the jury.

In appeal No. 89-6350, Plaintiff challenges the district court's award of costs to Defendant. This court reviews an award of costs under an abuse of discretion standard. United States Indus. Inc. v. Touche Ross & Co., 854 F.2d 1223, 1245 (10th Cir. 1988) With one exception, we affirm the district court's award of costs.

Plaintiff challenges the district court's taxation of a witness fee of thirty-five dollars for Defendant's expert witness. The witness fee for an expert witness who is not court-appointed is limited to the thirty dollar per day limit authorized in 28 U.S.C. Section 1821(b). Crawford Fitting Co. v. J.T. Gibbons, Inc. 482 U.S. 437, 441-42 (1987); Furr v. AT&T Technologies, Inc. 824 F.2d 1537, 1550 (10th Cir. 1987). A

federal court does not have jurisdiction to go beyond that statutory limitation. Crawford Fitting, 482 U.S. at 445. The district court, therefore, abused its discretion in awarding Defendant thirty-five dollars a day for two days as a witness fee for Defendant's expert witness.

To the extent appeal No. 89-6297 challenges the district court's imposition of sanctions against plaintiff's attorney, that appeal is DISMISSED for lack of appellate jurisdiction. We remand appeal No. 89-6350 to the district court for the purpose of reducing the total award of costs by ten dollars. See e.g., Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986). In all other respects, the judgments of the United States District Court for the Western

District of Oklahoma are AFFIRMED. Plaintiff's request for sanctions in appeal No. 89-6297 is DENIED.

Appendix B
Filed 2/7/89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Appellee.	)	

ORDER

This matter comes before the Court upon Defendant's Motion to Reconsider the Court's denial of its Motion for Judgment Notwithstanding the Verdict and upon Plaintiff's Response and Request for Sanctions.

In this case the plaintiff sued his employer, Defendant Scrivner, Inc.,

alleging that Scrivner terminated his employment because he is white, in violation of 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000(e). Plaintiff's Section 1981 claim was heard by a jury May 31, 1988, and a verdict was rendered in favor of the Plaintiff on June 2, 1988. Consistent with the jury verdict, the Court found in favor of the Plaintiff, on his Title VII claim and held a hearing on the feasibility of reinstatement of Mr. Riggs' employment with the Defendant. The court has not ruled on that matter and judgment has not been entered in this case.

In his Motion to Reconsider, Plaintiff asserts for the first time, that the jury verdict was an obvious compromise, and seeks Judgment NOV on that basis.

The court has determined that the

verdict in favor of the Plaintiff was likely reached as a result of jury compromise.

In his Section 1981 action, the Plaintiff requested compensation in the form of back pay and lost benefits. The issue of back pay was properly before the jury and the jury was instructed as to the issues of back pay and lost employment benefits. The jury found for the Plaintiff and awarded him $6,000.00 in damages.

The damages awarded by the jury bear no relationship to the evidence presented by the plaintiff at trial. Plaintiff presented evidence to the jury that his current employment pays him $9.00 per hour plus certain employment benefits, and his position with the Defendant paid $14.40 per hour at the time of his termination, plus substantial fringe

benefits which are not available at his present employment. Plaintiff's evidence indicated that he suffered a loss of back pay, including lost fringe benefits of approximately $65,000.00. Plaintiff also sought $150,000.00 in punitive damages. Although the court has a duty to reconcile the jury's verdict on any reasonable theory consistent with the evidence, Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 83 S. Ct. 659, 9 L.Ed.2d 618 (1963); Ortiz v. Bank of American National Trust and Savings Ass'n, 852 F.2d 383 (9th Cir. 1988), the court cannot reconcile a compromise judgment.

"A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages." (citations omitted) National Railroad

Passenger Corp. v. Koch Industries, Inc. 701, F.2d 108, 110 (10th Cir. 1983).

The court must examine several factors to determine whether a verdict is the result of jury compromise.

> In particular, a damage award that is grossly inadequate, a close question of liability, and an odd chronology of jury deliberations are all indicia of a compromise verdict.

Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1445-46 (10th Cir. 1988).

In this case the damage award is grossly inadequate, and bears no rational connection with the facts in evidence.

The question of liability was indeed a close one. The Court initially found in favor of the Defendant on Plaintiff's Title VII claim. That decision was based upon the evidence adduced at trial. Thereafter, the Court determined that its

ruling on Plaintiff's Title VII claim must comport with the jury's determination of Defendant's liability, reconsidered its initial decision and found in favor of the Plaintiff. Order of September 1, 1988.

In this case, the Plaintiff alleged that he was discharged because he is white. Defendant asserted that it terminated Plaintiff because he had absented himself from work without clocking out on several occasions. The Plaintiff admitted to the infraction, but asserted that several black employees had committed similar offenses and were subjected to discipline short of termination by the Company. According to the Plaintiff he would not have been discharged if he were not white, and the reason given for discharging him was pretextual. The question of pretext was

a close one, and evidence was presented by each side in support of its position.

Additionally, the pattern of jury deliberation lends itself to the conclusion that the verdict was a compromise. The jury retired at 2:20 p.m. June 1, 1988. At approximately 5:00 p.m., it indicated that it could not reach a verdict and requested to be discharged for the evening. It resumed deliberation the following morning, and thereafter it sent a note to the Judge which asked: "if we find in favor of the Plaintiff can we not award any damages at all?" The court responded and thereafter, at 11:30 a.m., the jury returned its verdict. The question asked by the jury and its sudden decision to award six thousand dollars to the Plaintiff shortly thereafter "raises the question of the reliability of the jury's

verdict." Skinner, supra, at 1446.

Neither party has offered any basis upon which the Court can reconcile the damage award with the evidence of damages presented at trial, nor can the Court find any relationship between the damage award and the evidence. Accordingly the Court finds that the damages awarded in this case appear to be arbitrary, the award bears no relationship to the evidence presented, representing less than ten percent of the damages claimed by the Plaintiff for back pay and fringe benefits. The question of liability in this case was a close one depending upon whether the Defendant's announced reason for terminating the Plaintiff's employment was a mere pretext for racial discrimination or whether is was the actual reason for discharging the Plaintiff. Finally, the jury's pattern

of deliberation , and particularly the jury's question, asking if it could find the Defendant liable and award no damages to the Plaintiff, provides a strong indication that the jury was seeking a compromise on the basic issue of whether the Defendant was liable under Section 1981.

In its Motion to Reconsider, Defendant seeks only reconsideration of the Court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict. The Order of denial was issued September 1, 1988, and Defendant makes reference to no Rule of Civil Procedure under which the Court could reconsider its Order of September 1, 1988.

The Court agrees with the Defendant that the jury verdict appears to have been a compromise verdict; however, the appropriate remedy in this case is for

the Court to order a new trial sua sponte, since judgment has not yet been entered in this case. Fed. R. Civ. P. 59(d).

The court notified the parties of its concern that the jury verdict appeared to have been a compromise verdict, pursuant to Fed. R. Civ. 59(d). A hearing was held and argument was presented by both parties on February 3, 1989. Upon consideration of the record in this case, and the facts and arguments presented, the court agree with the Defendant, that the jury verdict, appears to have been a compromise verdict, and further determines that a new trial should be ordered in this case.

Accordingly, Defendant's Motion to Reconsider is denied, and Plaintiff's Motion for Sanctions is denied. A new trial is ordered in this case to be set

on the April jury docket

IT IS SO ORDERED this 7th day of February, 1989.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

Appendix C
Filed 9/1/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS, Plaintiff,	)	
vs.	)	CIV-87-2301R
SCRIVNER, INC., Defendant.	)	

ORDER

This matter comes before the Court upon Defendant, Scrivner, Inc.'s Motion for Judgment Notwithstandin the Verdict or in the Alternative for New Trial.

This is an employment discrimination case in which the Plaintiff, a white man, asserted that his employment was terminated by the Defendant because of his race. On May 31, 1988, this case

came on for trial by jury on Plaintiff's claim under 42 U.S.C. Section 1981, and for trial by the Court pursuant to Plaintiff's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e).

After hearing the evidence, the jury, on June 2, 1988, returned its verdict in favor of the Plaintiff in the amount of $6,000.00. The Court heard the evidence with regard to the Title VII action, and announced its preliminary determination in favor of the Defendant. Since that time the Court has reconsidered its decision and, upon determination that it was bound by the finding of the jury, found for the Plaintiff on his Title VII action.

Defendant, Scrivner, seeks judgment nov pursuant to Fed. R. Civ. P. 50(b) or seeks a new trial pursuant to Fed. R.

Civ. P. 59.

It is Scrivner's position that there was not sufficient evidence to prove that Plaintiff's discharge from his employment was discriminatory, or that such discrimination was intentional.

For Plaintiff to prevail under Section 1981, there must be an affirmative showing of purposeful discrimination. General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982); Clark v. Atchison, Topeka & Santa Fe Railway Co., 731 F.2d 698 (10th Cir. 1980). That showing may be made by evidence which demonstrates Mr. Riggs was treated differently than black employees in similar situations. Montgomery v. Yellow Freight System, Inc., 671 F.2d 412 (10th Cir. 1982).

The parties stipulated that Plaintiff was terminated from his

employment with the Defendant on February 16, 1986 and that the Plaintiff admitted leaving Defendant's facility on two occasions without clocking out.

Defendant produced evidence at trial to show that the reason Mr. Riggs' employment was terminated was because he left work without clocking out and that such conduct subjected the offender to immediate discharge.

Plaintiff produced evidence at trial, by way of testimony and personnel records of other employees of Defendant, that on several occasions black employees committing the same offense or similar offenses were not fired, but were merely counseled or suspended. Plaintiff's evidence, if believed by the jury, could be construted as proving that such disparate treatment was racial in character and a violation of Section

1981.

In determining whether to grant Defendant's Motion for Directed Verdict, the Court must view the evidence most favorably to the Plaintiff, giving him the benefit of all reasonable inferences, and it may not substitute its judgment for that of the jury, Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984).

Applying that standard, the Court finds that there was sufficient evidence for the jury to find in favor of the Plaintiff.

Accordingly, Defendant's Motion for Judgment Notwithstanding the Verdict is hereby DENIED. Likewise, Defendant's Alternate Motion for a New Trial is DENIED.

ENTERED this 1st day of September, 1988.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

Appendix D
Filed 9/27/88

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

MOTION TO RECONSIDER DEFENDANT'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Comes now the Defendant, Scrivner, Inc. and moves the Court to reconsider its Motion for Judgment Notwithstanding the verdict for the reasons set forth in the attached brief.

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Appendix E
Filed 10/4/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS, Plaintiff,	)	
vs.	)	CIV-87-2301R
SCRIVNER, INC., Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Scrivner, Inc., Defendant in the above-styled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final order of the United States District Court for the Western District of Oklahoma, awarding attorney's fees to the Plaintiff, which order was entered on November 9, 1988.

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Attorneys for Defendant

APPENDIX F
Filed October, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

O R D E R

Plaintiff has moved for an award of attorney's fees pursuant to 42 U.S.C. Section 1988 and 42 U.S.C. Section 2000(e)(5)(k). Defendant responded, objecting both entitlement and the amount of fee sought. The matter was referred to the undersigned Magistrate for hearing, pursuant to 28 U.S.C. Section 636 and Local Rule 39. An evidentiary hearing was held on September 21, 1988,

all parties appearing through counsel, and in consideration of the arguments, evidence, and testimony, the Court rules as follows.

Plaintiff in this case was a white male employee of Defendant who was discharged by Defendant and sued for employment discrimination under both Title VII and 42 U.S.C. Section 1981. This was a "reverse discrimination" case. Despite an adverse decision in arbitration and the granting of summary judgment as to the Title VII claim, plaintiff prevailed by obtaining a $6,000 jury verdict on the Section 1981 claim. The Title VII summary judgment was later vacated, and the appropriate remedy is presently under advisement by Judge Russell. Counsel for plaintiff has submitted an affidavit in which he claims a reasonable attorney's fee in this

matter would be an award compensating him at $150 per hour for 90.1 hours and his legal assistant at $85.00 per hour for 189.9 hours, for a total fee sought of $29,656.50. At the time of hearing, certain corrections were made by plaintiff, revising downward the claim for attorney's time by 4.6 hours and legal assistant's time by 8 hours.

The Court finds that plaintiff, as prevailing party, is entitled to the award of a reasonable attorney's fee. Hensley v. Eckerhart, 461 U.S. 424 (1983); Ramos v. Lamm, 713 F.2d 546 (1983). Ramos sets out in some detail the considerations upon which the relevant factors in support of a reasonable fee are to be assessed and applied to achieve a just result. The first step is to determine the number of hours reasonably spent by counsel. Ramos, 713 F.2d at 553.

Evidence at the hearing on fees revealed that contemporaneous time records were not kept by counsel for plaintiff. Joseph McCormick, legal assistant to plaintiff's counsel, estimated that the number of time slips that had been reconstructed at the conclusion of the case could be one third, but frankly stated he really had no idea. It is obvious from even a cursory review of the time slips, that the majority are the result of reconstruction, rather than contemporaneous recording. Although counsel for plaintiff touts his expertise in the file of civil rights, he appears to be unaware that the Circuit has mandated in 1983, in Ramos, that contemporaneous time records be kept, reflecting not only the hours spent, but the specific tasks performed. While the failure to maintain contemporaneous

records does not automatically defeat plaintiff's claim for fees, it requires that "...(t)he district court should give special scrutiny to any reconstructions or estimates of time expended and make reductions when appropriate." Id., at n.2. Thus, defendant's motion to strike the attorney's fee affidavit for failure to keep contemporaneous time records is denied, but the affidavit will be carefully scrutinized.

In evaluating the number of hours spent in any civil rights case, the Court is required to examine the hours allotted to specific tasks, to determine whether the tasks sought to be charged to the adverse party would normally be billed to a paying client. Ramos, 713 F.2d at 554. In this case, plaintiff's counsel attempts to bill all hours spent by his legal assistant, despite the testimony of

the legal assistant, Joseph McCormick, that he spent a large number of hours educating himself on the law of civil rights cases. Although plaintiff's counsel attempts to justify the award of fees for this time by virtue of his visual impairment and the corresponding need for the aid of a legal assistant, the Court believes that this is one of those tasks that should not and would not ordinarily be billed to a client, and thus may not be sought from opposing parties. Another consideration is the duplication of services, and again the Court finds certain tasks, for which both counsel and his legal assistant billed time, result in multiple compensation which is inappropriate, Id.

Ramos counsels that the next inquiry is the determination of a reasonably hourly rate. Mr. Braswell, counsel for

plaintiff, claims his services are entitled to be compensated at the rate of $150.00 per hour. He offers no evidence in support of that rate as reasonable. Mr. Braswell's argument is that, because counsel for defendant charges $145.00 per hour, he should be compensated in at least an equivalent amount. Counsel offered no evidence as to his normal billing rate; in fact, he apparently has no normal billing rate, as all cases are accepted on either a flat fee or contingent basis. Although counsel, as mentioned, believes himself highly experienced in the area of civil rights law, he admitted that this particular type of case, i.e., reverse discrimination, was new to him. Further, he relied almost exclusively on the preparation and work of a legal assistant, and the testimony at the

hearing was that some of the hours spent were as a result of the file does not support either Mr. Braswell's claim or a finding that his skill and experience justifies an award of $150.00 a hour. The Court finds $100 per hour to be a reasonable rate after compensation for Mr. Braswell.

No evidence was adduced supporting an award of $85.00 per hour for the hours expended by a legal assistant. Again, counsel asserts his need for the work of his legal assistant, being greater than that of a lawyer without visual impairment, justifies payment of that assistant at a higher rate. Counsel offers neither evidence nor case law to support this theory, and the Court finds that, as is the case with attorney time, both the hours spent and rates charged must be scrutinized in accord with the

prevailing practice in the community. Ramos, 713 F.2d at 559. Evidence was submitted by defendant that the maximum hourly charge for paralegal time in this community is $50.00 per hour. Because Mr. McCormick appears to be experienced in the field and competent at his work, and further because he had graduated from law school at the time the services were performed although he was not a member of the bar, $50 per hour for his work is reasonable.

Having found a reasonable rate of compensation, the Court returns to the question of the reasonable number of hours spent. Because the time records are not contemporaneous, the Court must examine with scrutiny the time claims for each specific task. The Court finds an excessive number of hours devoted to research, preparation, and other tasks

with respect to the arbitration hearing and request for trial de novo. Consequently, the number of hours claimed will be reduced three hours for Mr. Braswell and five hours for Mr. McCormick. The trial preparation time claimed in late May for both Braswell and McCormick, subject to special scrutiny because of the absence of contemporaneous records, appears in excess of that either reasonably or likely spent, and will be reduced by five hours for both. Finally, duplication of efforts appear at those entries dated March 14, 1988, April 28, 1988, June 1, and June 2, for which Mr. McCormick's hours will be reduced 15.8. At least partial duplication appears on May 28 through 31, for which Mr. McCormick's hours will be reduced 14.

Plaintiff claims entitlement to enhancement of these fees based on the

exceptional success and excellent result achieved. See Hensley v. Eckerhart,, 461 U.S. at 434. Although plaintiff obtained a recovery in the amount of $6,000, the $65,000 in back pay and punitive damages were not awarded. Thus, although plaintiff did achieve a success, it was not total nor exceptional. Counsel did not exhibit the extraordinary skill which would justify such a award. Ramos, 713 F.2d at 557. A bonus for social stigma should rarely be given, id. at 558, and no social stigma or undesirability, apart from the slim chance of success, has been shown. No bonus for the contingent nature of the fee is warranted in this case, id. at 558, expecially considering that counsel was paid a retainer in addition to the possibility of a count-awarded fee. In short, none of the factors listed in Ramos or Hensley

support plaintiff's request for an enhanced fee in this case. Plaintiff's contention that the constant threat of sanctions supports an enhanced fee is not supported by either controlling law or the facts of this case.

Finally, counsel seeks fees for the time spent in connection with the hearing on attorney's fees, to which he is entitled. The Court takes judicial notice that the hearing on fees lasted five hours, for which Mr. Braswell is entitled to be compensated at the rate of $100 per hour. No fee appears to be sought by Mr. McCormick, and in any event, such an award would constitute the duplication of effort found unwarranted above.

In accordance with the foregoing, it is ORDERED that plaintiff is entitled to a reasonable attorney's fee, determined

by the Court to be 77.5 hours of attorney time, to be compensated at $100 an hour and 142.1 hours of legal assistant time,to be compensated at $50.00 per hour. An additional five hours, at the rate of $100 per hour for the hearing on attorney's fees will be awarded, for a total sum of $15,355.00. As agreed at the hearing, counsel for plaintiff may withdraw the original time slips and substitute copies, within ten (10) days. As provided in Local Rule 39, any party aggrieved by this order may appeal within ten (10) days.

IT IS SO ORDERED this 4th day of October, 1988.

ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

Appendix G
Filed 9/27/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-87-2301R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Scrivner, Inc., Defendant in the above-styled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final order of the United States District Court for the Western District of Oklahoma in this

action on the 1st day of September, 1988.

Peter T. Van Dyke
David M. Curtis
Randall W. Kamp

LYTLE SOULE & CURLEE
1200 Robinson
Renaissance
119 N. Robinson
Oklahoma City, OK 73102
405/235-7471

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1991, three (3) correct copies of the foregoing APPENDIX was mailed, postage prepaid, to the following:

Peter Van T. Dyke
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
(405) 235-7471

Michael T. Braswell

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Petitioner's Appendix was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on August 7th, 1991, from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

Michael T. Braswell
3621 N. Kelley, Suite 100
Oklahoma City, OK 73111
405/232-1950

STATE OF OKLAHOMA,)
) SS.
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 7th day of August, 1991.

Barbara Braswell
Notary Public

My Commission Expires 10-19-93.